

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.2.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.Nos.112, 174, 175, 194, 201 to 204 of 2000
(Reference Nos 65,119,120,139,146 to 149 of 2000)

T.C.No.112 of 2000

1. M/s M.Sajjanraj Nahar

2. M/s M.Sajjanraj Nahar & Sons
277, Main Road, Mettupalayam

3. M/s M.Sajjanraj Nahar & Family
277, Main Road, Mettupalayam

.. Applicants
in all TC.,

Vs

The Commissioner of Income Tax
Coimbatore.

.. Respondent
in all TCs

and batch cases.

PRAYER: Tax case references under Section 256(2) of the Income Tax Act 1961 against the order of the Income Tax Appellate Tribunal, Madras Bench 'B', Chennai dated 25.9.1997 R.A.Nos.774 to 781/Mds/97 in I.T.A.No.878, 879, 880 and 909 to 913/Mds/1991 for the assessment years 1982-83, 1985-86, 1986-87 and 1987-88 against the order of the Commissioner of Income Tax (Appeals) Coimbatore dated 26.2.1991 and made in I.T.Appeal No.594-c/90-91, 591-c, 599-c/90-91, 597-c & 598-c/90-91, 590-c, 585-c/90-91, 584-c/90-91 respectively against the order of the Assistant Commissioner of Income Tax, company circle II (1), Coimbatore, dated 9-3-1990 and made in No.

47-021-HX-5298

com.cir.II (1)/cbe/1987-88,1982-83, ,

47-021-PY-2856

com.cir.II (1)/CBE 1987-88

49-571-PU-2040

com.cir.II (1)/Cbe-1982-83,1986-87 , com.cir.II (1)/Cbe-1985-86, and

4-511-PV-2040

com.cir.II (1)/Cbe-1987-88 respectively

For Applicants : Mr.J.Balachander
For Respondent : Mr.N.Muralikumaran
Senior Standing Counsel
for Income Tax

JUDGMENT

(Delivered by P.D.DINAKARAN,J.)

Pursuant to the directions of this court dated 3.8.1999 in T.C.P. Nos. 101 to 108 of 1999, the Appellate Tribunal has stated the case and referred to us the following questions of law:

(i) Whether on the facts and in the circumstances of the case the Tribunal was correct in law in sustaining the levy of penalty under Section 271(1)(c) of the Income Tax Act?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal has any material to hold that the assessee in filing the revised return of income has not acted bonafide? and

(iii) Whether on the facts and in the circumstances of the case the Tribunal was correct in holding that the levy of penalty is justifiable merely for the reason that no reasons were furnished by the assessee for filing an upward revision of income in the revised return of income?

2. The brief facts of the case are narrated as follows:

2.1. The case of all the assesseees under reference is, admittedly, identical and therefore, the case of M/s.Sajjanraj Nahar & Sons is stated as a benchmark.

2.2. The assessee was carrying on the business in financing and hire purchase of vehicles. A return was filed on 28.7.1987 declaring taxable income of Rs.88,010/- which was arrived at after deducting a sum of Rs.61,200/- in respect of the interest paid on loans obtained from different parties in the earlier assessment years.

2.3. After completing the assessment under Section 143(1) of the Act, the Assessing Officer reopened the case and issued a notice under Section 143(2) of the Act, and in response to the said notice the assessee appeared with the books of accounts and submitted a revised return on 18.1.1988 declaring total income of Rs.1,49,210/- which was arrived at after showing a further sum of Rs.61,200/- to Rs.88,010/- originally declared.

2.4. The Assessing Officer accepted the income returned in the revised return and completed the assessment in a sum of Rs.1,49,210/-. In each of the assessment orders even dated 9.3.1990, the Assessing Officer had made the following indication:

"Penalty proceedings are initiated separately under Section 271(1) (c) and 273 (2) (a)"

2.5. Pursuant to the said assessment orders even dated 9.3.1990, the Assessing Officer initiated penalty proceedings under Sections 271(1)(c) and 273(2)(a) of the Income Tax Act, as proposed and called for explanation from the assessee.

2.6. Even after the receipt of the notice issued under Section 271(1) (c) of the Act, the assessee instead of offering explanation to the said notice, had stated that a petition under Section 273A of the Act had been made to the Commissioner of Income Tax and therefore, requested for a stay of all further penalty proceedings initiated already. As no other explanation was offered by the assessee, except as stated above, the Assessing Officer, by orders even dated 25.9.1990, came to the conclusion that the assessee had deliberately concealed the particulars of its income by introducing its own income as credits in fictitious names in the books of accounts and also claimed bogus payment of interest as expenditure, and issued demand notices for penalty from the respective assesseees.

2.7. It is apparent on the face of the respective orders even dated 25.9.1990 issued under Section 271(1)(c) of the Act that the assessee, on learning that during the search operation at Madras on 25.6.1985 at the premises of some other persons dealing with hawala transactions, had introduced bogus credits in the books of accounts and filed revised return on 18.1.1988 disclosing additional income being bogus credits and interest on bogus credits. It is further alleged in the said orders even dated 25.9.1990 that the assessee had deliberately and with due knowledge and intention to defraud the Revenue had credited his own cash outside the books in fictitious names and also claimed payment of interest thereon and did not disclose the correct income in his return filed on 28.7.1987.

2.8. In the meanwhile, the assesseees also preferred appeals against the assessment orders before the Commissioner of Income Tax (Appeals), who, by order dated 26.2.1991, allowed the appeals following the decision

of the Apex Court in Sir Shadilal Sugar and General Mills Ltd. v. CIT, [1987] 168 ITR 705.

2.9. The said order of the Commissioner of Income Tax (Appeals) dated 26.2.1991 was appealed before the Tribunal by the Revenue. The Tribunal, by order dated 25.9.1997, set aside the order of the Commissioner of Income Tax (Appeals) disagreeing with the contention of the assessee that the filing of revised return voluntarily, without any detection of concealed income, exonerates the assessee from the penal consequences of Section 271(1)(c) of the Act. The Tribunal, in detail discussed the facts and circumstances of the cases, the conduct of the assessee and came to the conclusion that:

- (i) the assessee did not act bonafide and honestly in returning the correct income originally;
- (ii) the filing of the revised return offering additional income by way of adding interest expenditure cannot be considered as bonafide act; and
- (iii) the Assessing Officer was fully justified in initiating and thereafter, levying penalty under Section 271(1)(c) of the Act, after calling for explanation from the respective assessee, as the assessee failed to offer any convincing explanation.

Hence, these references.

3.1.1. Mr. J. Balachander, learned counsel for the applicants contends that the Tribunal erred in setting aside the well-considered orders of the Commissioner of Income Tax (Appeals) following the decision of the Apex Court in Sir Shadilal Sugar and General Mills Ltd. v. CIT, [1987] 168 ITR 705, which was also followed by the Delhi High Court in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; and (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571.

3.1.2. According to the learned counsel for the applicants, since the assessment orders suffer from jurisdictional defects, which cannot be cured, the consequential penalty proceedings are not sustainable in law. Elaborating his contention and deriving support from the decisions of the Delhi High Court in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571, he submits that the satisfaction for initiating penal proceedings has to be before the issue of notice or initiation of any step for imposing penalty; or otherwise, the very jurisdiction to initiate penalty proceedings is questionable and consequently all the subsequent proceedings leading up to the passing of the penalty order must fail. In this context, it is added

that the Tribunal erred in sustaining the levy of penalty under Section 271(1)(c) of the Act in the respective case of the assessee, as each of the assessee had fairly disclosed income in the revised returns supported with their books of accounts, which were also accepted by the Assessing Officer without rejection.

3.2. Incidentally, with regard to the second question of law, the learned counsel for the assessee contends that the Tribunal has erred in holding that the assessee had not acted bonafide in filing the revised return of income.

3.3. With regard to the third question of law, the learned counsel for the assessee contends that the Tribunal erred in justifying the levy of penalty, merely for the reason that the assessee failed to submit reasons for filing an upward revision of income in the revised return.

4.1.1. Per contra, Mr.N.Muralikumaran, learned Senior Standing Counsel appearing for the Revenue, submits that the Apex Court in K.P. Madhusudhanan Vs. Commissioner of Income-tax, [2001] 251 ITR 99, taking note of the explanation inserted to Section 271 of the Act, held that the decision in Sir Shadilal Sugar and General Mills Ltd. v. CIT, [1987] 168 ITR 705, which was relied upon by the Commissioner of Income Tax (Appeals), is no more good law.

4.1.2. It is further contended that the decisions relied upon by the assessee, namely (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; and (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571, are not applicable to the facts and circumstances of these cases, as they are not at all related to the revised returns.

4.1.3. Inviting our attention to the ratio laid down by the Apex Court in CIT v. S.V.Angidi Chettiar [1962] 44 ITR 739, the learned Senior Standing Counsel for the Revenue contends that the decision in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; and (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571, do not hold good.

4.1.4. It is also contended that the case of assessee is squarely covered by the decision of this Court in (i) Commissioner of Income-tax Vs. Subramania Chettiar (J.K.A.), [1977] 110 ITR 602; and (ii) Ravi and Co. Vs. Assistant Commissioner of Income Tax, [2004] 271 ITR 286.

4.2.1. With regard to questions of law (ii) and (iii) under reference, it is contended that the said questions are purely related to the findings rendered by the Tribunal in its order dated 25.9.1997, viz.,

(i) the assessee did not act bonafide and honestly in returning the correct income originally;

(ii) the filing of the revised return offering additional income by way of adding interest expenditure cannot be considered as bonafide act; and

(iii) the Assessing Officer was fully justified in initiating and thereafter, levying penalty under Section 271(1)(c) of the Act, after calling for explanation from the respective assessee, as the assessee failed to offer any convincing explanation.

4.2.2. According to the learned Senior Standing counsel, since the said findings do not need any interference, the questions of law (ii) and (iii) raised by the learned counsel for the appellants are liable to be answered against the assessee.

5. We have given our careful consideration to the submissions of both sides.

6. Question (i): Whether on the facts and in the circumstances of the case the Tribunal was correct in law in sustaining the levy of penalty under Section 271(1)(c) of the Income Tax Act?

6.1. In this regard, it is apt to refer Section 271 of the Income Tax Act, 1961 and the corresponding Section of the Income Tax Act, 1922, viz., Section 28, which read as under:

Section: 271 of the Income Tax Act, 1961

"Section 271. Failure to furnish returns, comply with notices, concealment of income, etc.-

(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person--

(a)

(b) has failed to comply with a notice under sub-section (1) of section 142 or sub-section (2) of section 143, or fails to comply with a direction issued under sub-section (2A) of section 142, or

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,--

(i)

(ii) in the cases referred to in clause (b), in addition to tax, if any, payable by him, a sum of ten thousand rupees for each such failure ;

(iii) in the cases referred to in clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Explanation 1.--Where in respect of any facts material to the computation of the total income of any person under this Act,--

(A) such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed.

Explanation 2.--Where the source of any receipt, deposit, outgoing or investment in any assessment year is claimed by any person to be an amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year or years but in respect of which no penalty under clause (iii) of this sub-section had been levied, that part of the amount so added or deducted in such earlier assessment year immediately preceding the year in which the receipt, deposit, outgoing or investment appears (such earlier assessment year hereafter in this Explanation referred to as the first preceding year) which is sufficient to cover the amount represented by such receipt, deposit or outgoing or value of such investment (such amount or value hereafter in this Explanation referred to as the utilised amount) shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the first preceding year ; and where the amount so added or deducted in the first preceding year is not sufficient to cover the utilised amount, that part of the amount so added or deducted in the year immediately preceding the first preceding year which is sufficient to cover such part of the utilised amount as is not so covered shall be treated to be the

income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the year immediately preceding the first preceding year and so on, until the entire utilised amount is covered by the amounts so added or deducted in such earlier assessment years.

Explanation 3.--Where any person fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April, 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause (i) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.

Explanation 4.--For the purposes of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded",--

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income ;

(b) in any case to which Explanation 3 applies, means the tax on the total income assessed ;

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.

Explanation 5.--Where in the course of a search under section 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter in this Explanation referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income,--

(a) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or

(b) for any previous year which is to end on or after the date of the search,

then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (c) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income, unless,--

(1) such income is, or the transactions resulting in such income are recorded,--

(i) in a case falling under clause (a), before the date of the search ; and

(ii) in a case falling under clause (b), on or before such date,

in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief Commissioner or Commissioner before the said date ; or

(2) he, in the course of the search, makes a statement under sub-section (4) of section 132 that any money, bullion, jewellery or other valuable article or thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

Explanation 6.--Where any adjustment is made in the income or loss declared in the return under the proviso to clause (a) of sub-section (1) of section 143 and additional tax charged under that section, the provisions of this sub-section shall not apply in relation to the adjustment so made.

Explanation 7.-- Where in the case of an assessee who has entered into an international transaction defined in section 92B, any amount is added or disallowed in computing the total income under sub-section (4) of section 92C, then, the amount so added or disallowed shall, for the purposes of clause (c) of this sub-

section, be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.

(1A) Where any penalty is imposable by virtue of Explanation 2 to sub-section (1), proceedings for the imposition of such penalty may be initiated notwithstanding that any proceedings under this Act in the course of which such penalty proceedings could have been initiated under sub-section (1) have been completed.

(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under clause (b) of section 183 then, notwithstanding anything contained in the other provisions of this Act, the penalty imposable under sub-section (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm.

(3) ...

(4) If the Assessing Officer or the Commissioner (Appeals) in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership on the basis of which the firm has been registered under this Act, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall, in addition to the tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(5) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amend.) Act, 1989, shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year."

(emphasis supplied)

Section: 28 of the Income Tax Act, 1922

Section: 28. Penalty for concealment of income or improper distribution of profits.--

(1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person--

(a) has without reasonable cause failed to furnish to return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or

(b) has without reasonable cause failed to comply with a notice under sub-section (4) of section 22 or sub-section (2) of section 23, or

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he or it may direct that such person shall pay by way of penalty, in the case referred to in clause (a), in addition to the amount of the income-tax and super-tax, if any, payable by him a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax payable by him, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income:

Provided that--

(a) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub-section (2) of section 22 ;

(b) where a person has failed to comply with a notice under sub-section (2) of section 22 or section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be a penalty not exceeding twenty-five rupees ;

(c) no penalty shall be imposed under this sub-section upon any person assessable under section 42 as the agent of a person not resident in the taxable territories for failure to furnish the return required under section 22 unless a notice under sub-section (2) of that section or under section 34 has been served on him ;

(d) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under clause (b) of sub-section (5) of section 23, then, notwithstanding anything contained in the other provisions of this Act, the amount of income-tax and super-tax payable by the firm itself shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in clauses (b) and (c), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm.

(2) If the Income-tax Officer, the Appellate Assistant Commissioner, or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act governing such distribution, and that any partner has thereby returned his income below its real amount, he or it may direct that such partner shall in addition to the income-tax and super-tax, if any, payable by him by way of penalty a sum not exceeding one and a half times the amount of income-tax and super-tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income ; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard.

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

(5) An Appellate Assistant Commissioner or the Appellate Tribunal on making an order under sub-section (1) or sub-section (2), shall forthwith send a copy of the same to the Income-tax Officer.

(6) The Income-tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner."

(emphasis supplied)

6.2. The question of initiating penalty proceedings under Section 28 (1) of the Income Tax Act, 1922 came up for consideration of the Apex Court in CIT v. S.V.Angidi Chettiar [1962] 44 ITR 739, which is also relied upon by the Delhi High Court in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; and (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571. The Apex Court in CIT v. S.V.Angidi Chettiar [1962] 44 ITR 739, held as follows:

"The power to impose penalty under section 28 depends upon the satisfaction of the Income-tax Officer in the course of proceedings under the Act ; it cannot be exercised if he is not satisfied about the existence of conditions specified in clause (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-tax Officer before the completion of the assessment proceedings by the Income-tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction."

6.3. By placing reliance on the said decision in CIT v. S. V. Angidi Chettiar [1962] 44 ITR 739, the Delhi High Court in Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571, held that satisfaction has to be before the issue of notice or initiation of any step for imposing penalty and such requisite satisfaction has to be recorded in the proceedings or otherwise, the penalty proceedings initiated would suffer jurisdictional defect which cannot be cured; and that initiation of penalty proceedings are itself bad and consequently, all the subsequent proceedings leading up to the passing of penalty order must fail. The ratio laid down by the Apex Court in CIT v. S. V. Angidi Chettiar [1962] 44 ITR 739 is also followed in CIT Vs. Vikas Promoters P. Ltd., [2005] 277 ITR 337 by the Delhi High Court.

6.4. But, with respect, we are unable to agree with the view expressed by the Delhi High Court in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571; and (c) CIT Vs. Vikas Promoters P. Ltd., [2005] 277 ITR 337, with regard to the reliance placed on the ratio laid down by the Apex Court in CIT v. S. V. Angidi Chettiar [1962] 44 ITR 739, because in the said decision, the Supreme Court also observed that:

"There is no evidence on the record that the Income-tax Officer was not satisfied in the course of the assessment proceeding that the firms had concealed its income. The assessment order is dated the 10th of November, 1951, and there is an endorsement at the foot of the assessment order by the Income-tax Officer that action under section 28 had been taken for concealment of income

indicating clearly that the Income-tax Officer was satisfied in the course of the assessment proceeding that the first had concealed its income."

(emphasis supplied)

The above observation of the Apex Court in CIT v. S. V. Angidi Chettiar [1962] 44 ITR 739, dealing with the indication of the Assessing Officer as to the proposed penalty proceedings with regard to the concealment of income in the course of the assessment proceedings by the Assessee, in our considered opinion, was not brought to the notice of the Delhi High Court in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571; and (c) CIT Vs. Vikas Promoters P. Ltd., [2005] 277 ITR 337. Therefore, the indication in the Assessment Order by the Assessing Officer that penalty proceedings are initiated separately is suffice to prove that the Assessing Officer had satisfied himself in the course of the assessment proceedings that the assessee had concealed his income, as in the instant case.

6.5. The scope and ambit of Section 28(1)(c) of the Old Act, viz., Income Tax Act, 1922, came up for a detailed consideration in the following decisions:

(a) The Full Bench of this Court in Arunachalam Chettyar v. Commissioner of Income-tax [1931] 6 ITC 58 held as under:

"It is argued here that the assessee discovered on the 7th January, 1929, that his previous return was an inaccurate one and that he was, therefore, entitled to claim the benefit of section 22(3) and make a revised return and as that has been accepted no penalty can be inflicted upon him for having concealed his income. That certainly is the correct statement of what an assessee is entitled to do, if he makes a bona fide discovery that he has made a previous incorrect return but it certainly does not apply to the facts of this case which show clearly that the previous return was deliberately dishonestly made. It is seriously argued that, notwithstanding that fact, the assessee is still enabled to put in a return correcting his former inaccurate one and that he is to be absolved from liability to have any penalty inflicted upon him. That, it seems to me, is to put a premium on dishonesty and nowhere in the Income-tax Act do we find any provision which does anything of the kind. The contention that this was a discovery within the meaning of section 22(3) is of course futile. As the Income-tax Commissioner points out in his order of reference the assessee did not discover on that day that he had made an incorrect return because at the time when he made his previous return he knew it was incorrect and he

could not at any subsequent time have discovered something which he knew at an earlier time. Under these circumstances, the income-tax authorities were perfectly correct and within their rights in inflicting the penalty upon the assessee."

(emphasis supplied)

(b) Again in *Ayyasami Nadar & Bros. v. Commissioner of Income-tax* [1956] 30 ITR 565, this Court, while dealing with the contention of the assessee that the assessee had a right to submit a revised return of his income - and his admission before the Income-tax Officer should be taken as such revised return - there was no concealment of the particulars of his income in this notionally revised return, held that:

"We consider that there is no substance in this point particularly in view of the finding of the income-tax authorities, that the admission by the assessee was made after the Income-tax Officer had come to know of the facts, and that in the circumstances he was forced to admit these facts. Even apart from this, we consider that section 28(1) (c) would be attracted if there had been a deliberate concealment of particulars in any return, and in the circumstances of the present case it is clear that the original return did not disclose considerable portions of the income and the finding is that the concealment was deliberate."

(emphasis supplied)

(c) The Bombay High Court in *Vadilal Ichhachand v. Commissioner of Income-tax* [1957] 32 ITR 569, held as under:

"that the return that had to be taken into account under section 28(1) (c) of the 1922 Act was the return which if accepted would have avoided tax and which was not accepted and that, therefore, the penalty had to be calculated on the basis of the original return and the Tribunal erred in holding that the revised return subsequently filed had to be taken into account and that the assessee was not liable to penalty."

(emphasis supplied)

(d) The Bombay High Court, in yet another case, viz., *Dayabhai Girdharbhai v. Commissioner of Income-tax*, [1957] 32 ITR 677, held thus:

"Now, Mr. Pandit on behalf of the assessee, in the first instance, has argued that every assessee has a right to file a revised return under section 22, sub-section (3),

and if that return is in effect accepted, the earlier return must be treated as cancelled for all purposes and no penalty can be imposed in respect of any concealment in the earlier return. Now, it is perfectly true that every assessee has the right under section 22, sub-section (3), to submit a revised return if he discovers any omission or wrong statement in his original return before the assessment is made. But the omission or wrong statement may be accidental or deliberate. Where it is accidental, no result may ensue by reason of the omission; but where the omission is deliberate, the results of such deliberate omission cannot be got rid of merely by filing a revised return."

(e) Again the Madras High Court in Sivagaminatha Moopanar & Sons v. Commissioner of Income-tax, [1964] 52 ITR 591, following the decision of the Full Bench of this Court in Arunachalam Chettyar v. Commissioner of Income-tax [1931] 6 ITC 58, and referring the decision in Ayyaswami Nadar & Brothers v. Commissioner of Income-tax 1956] 30 ITR 565 [held as follows:

"If an assessee, therefore, makes a false return knowing it to be false, the fact that he subsequently discloses the true particulars of income cannot prevent the application of the section which is intended to punish fraud or contumacy on the part of the assessee. Indeed in such a case it would not even be open to the assessee to submit a revised return: see Arunachalam Chettyar v. Commissioner of Income-tax [1931] 6 ITC 58 (Mad) [FB]. The point, therefore, is not whether all the particulars were given at the time of the return or at or before the assessment, but whether at any time the assessee deliberately concealed particulars or gave false particulars. That obviously is a question of fact. In the decision of the question certain tests are applied to find whether the suppression, etc., was deliberate. Where for example the original return is incorrect, but the assessee voluntarily submits the correct return before the assessment, the Tribunal would be justified in coming to the conclusion that there was no concealment. This would be so even if the assessee put forward a false case after giving voluntarily the particulars. But where the disclosure was under circumstances which make it not a voluntary act of the assessee, there would be a justification for the finding that there was a concealment because there was an intention to conceal and actual concealment at the beginning, the attempt having been frustrated by other causes. It cannot, therefore, be held that wherever particulars are given before the actual assessment, there would be no concealment.

...

It follows that, if the assessee, at the time of submitting the original return intended to conceal a part of his income or deliberately gave false particulars at that time, the mere fact that he subsequently rectified the omission by giving the full particulars would not avoid the applicability of section 28(1)(c)."

(emphasis supplied)

6.6. The scope and ambit of Section 271(1)(c) of the New Act, viz., Income Tax Act, 1961, came up for consideration in the following decisions:

(a) The Gauhati High Court in F. C. Agarwal v. Commissioner of Income-tax, [1976] 102 ITR 408, held as follows:

"If after having furnished the return the assessee discovers that some omission has taken place or some wrong statement has crept in in the return, he may file a revised return wherein he may correct the omission or the wrong statement made in the original return. Sub-section (5) further provides that in order to enable an assessee to file a revised return as contemplated under sub-section (5) the omission or wrong statement that might have occurred or crept in in the original return, must be discovered by the assessee himself. In other words, if after examining the return and accounts in the proceedings the discovery of the omission or wrong statement is made by the departmental authority and thereafter the revised return purported to be under sub-section (5) is filed, that will not be considered as a revised return under sub-section (5). As a proposition of law it may be correct that if a revised return as contemplated under sub-section (5) is submitted before the assessment is made after the assessee having discovered some omission or some wrong statement in the original return and in the revised return he makes correction of the omission or the wrong statement, a penalty proceeding for concealment of the particulars of income or furnishing inaccurate particulars of such income as contemplated under clause (c) of sub-section (1) of section 271 may not be attracted. But, to avoid the penalty proceeding as contemplated under section 271(1)(c) by reason of submission of revised return, the revised return itself must be within the correct ambit and scope of sub-section (5) of section 139 of the Act. If it cannot be said that a revised return in fact does come within the correct ambit and scope of section 139(5), then immunity from section 271(1)(c) cannot be availed of by the assessee."

(emphasis supplied)

(b) This Court in Commissioner of Income-tax Vs. Subramania Chettiar (J.K.A.), [1977] 110 ITR 602, after referring to the decisions in (a) Arunachalam Chettyar v. Commissioner of Income-tax [1931] 6 ITC 58; (b) Ayyasami Nadar & Bros. v. Commissioner of Income-tax [1956] 30 ITR 565; (c) Vadilal Ichhachand v. Commissioner of Income-tax [1957] 32 ITR 569; (d) Dayabhai Girdharbhai v. Commissioner of Income-tax, [1957] 32 ITR 677; (e) Sivagaminatha Moopnar & Sons v. Commissioner of Income-tax, [1964] 52 ITR 591; and F. C. Agarwal v. Commissioner of Income-tax, [1976] 102 ITR 408, held as under:

"The only other question for consideration is whether the said concealment will come within the scope of the provision in section 271(1)(c) of the Act which we have extracted already or not. The section uses the expression "has concealed the particulars of his income." It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, third edition, volume I, is as follows:

"In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."

Consequently, there can be no doubt, with reference to the facts stated above, that both in the first return as well as in the second return the assessee had intentionally and deliberately concealed the particulars of his income."

...

"We may also point out that the liability to penalty under section 271(1)(c) of the Act and the filing of a revised return under section 139(5) of the Act are mutually exclusive. Section 139(5) of the Act proceeds on the basis of omission or wrong statement which had crept into the original return being inadvertent and unintentional, while section 271(1)(c) of the Act proceeds on the basis of concealment being deliberate and the furnishing of inaccurate particulars being wilful and intentional. Consequently, if a case falls within the scope of section 139(5) of the Act, there would be no chance for levy of penalty under section 271(1)(c) of the Act. If, on the other hand, the case does not fall within the scope of section 139(5) of the Act the fact that the assessee purported to file a revised return will not absolve him from liability to penalty under section 271 (1)(c) of the Act, if he had concealed particulars of income or deliberately furnished inaccurate particulars of income in the original return already filed by him."

and held as under:

as the assessee had intentionally and deliberately concealed the particulars of his income in the first return as well as in the second return, he cannot escape the liability to penalty under section 271(1)(c).

Section 139(5) applies only to a limited category of cases where in the original return there was any omission or any wrong statement and not cases of concealment or false statements. If a case does not fall under section 139(5), the fact that the revised return was filed before any investigation was started by the income-tax department will be of no consequence.

The fact that the assessee furnished the particulars before any detection was made by the department or not will be relevant only when the Commissioner is considering the question whether the minimum penalty imposable under section 271(1) should be waived or reduced, on an application made by the assessee under section 271(4A), but they are foreign to the scope of section 271(1)(c).

The Tribunal was, therefore, in error in holding that there had been no concealment of particulars of income in the present case."

6.7. It is true, the Apex Court in *Sir Shadilal Sugar and General Mills Ltd. v. CIT*, [1987] 168 ITR 705 held that a taxpayer might agree to additions to his income for hundred and one reasons but that by itself will not be sufficient to treat the amount added or surrendered as the concealed income of that taxpayer. But, in view of the deletion of the word "deliberately" by the Amendment Act, the jurisdiction of the Revenue to initiate penalty proceedings for the concealment of the income or furnishing inaccurate particulars by the assessee has become more stringent, of course subject to the procedure prescribed under the Explanation to Section 271(1)(c) of the Act to enable the assessee to submit his explanation in this regard.

6.8. As rightly pointed by Mr.N.Muralikumaran, learned Senior Standing Counsel for the Revenue, the view of the Apex Court in *Sir Shadilal Sugar and General Mills Ltd. v. CIT*, [1987] 168 ITR 705 was held no more a good law in the decision of the Apex Court in *K.P. Madhusudhanan Vs. Commissioner of Income-tax*, [2001] 251 ITR 99, taking note of the explanation to Section 271 of the Act, whereunder it is held as under:

"Learned counsel for the assessee then drew our attention to the judgment of this court in *Sir Shadilal Sugar and General Mills Ltd. v. CIT* [1987] 168 ITR 705. He submitted that the assessee had

agreed to the additions to his income referred to hereinabove to buy peace and it did not follow therefrom that the amount that was agreed to be added was concealed income. That it did not follow that the amount agreed to be added was concealed income is undoubtedly what was laid down by this court in the case of Sir Shadilal Sugar and General Mills Ltd. [1987] 168 ITR 705 and that, therefore, the Revenue was required to prove the mens rea of a quasi-criminal offence. But it was because of the view taken in this and other judgments that the Explanation to section 271 was added. By reason of the addition of that Explanation, the view taken in this case can no longer be said to be applicable."

6.9.1. The learned counsel for the appellant/assessee strongly emphasises on the relevant portions of the decisions in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571; and (c) CIT Vs. Vikas Promoters P. Ltd., [2005] 277 ITR 337, referred to hereunder.

6.9.2. In Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568, it was held as follows:

"A bare reading of the provisions of section 271 and the law laid down by the Supreme Court makes it clear that it is the assessing authority which has to form its own opinion and record its satisfaction before initiating the penalty proceedings. Merely because the penalty proceedings have been initiated, it cannot be assumed that such a satisfaction was arrived at in the absence of the same being spelt out by the order of the assessing authority. Even at the risk of repetition we would like to state that the assessment order does not record the satisfaction as warranted by section 271 for initiating the penalty proceedings."

(emphasis supplied)

6.9.3. Similarly, in Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571, it was held as under:

"Satisfaction has to be before the issue of notice or initiation of any step for imposing penalty. In the case at hand we find the Assessing Officer having nowhere recorded till the conclusion of the assessment proceedings his satisfaction that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income. This is a jurisdictional defect which cannot be cured. The initiation of the penalty proceedings was itself bad and, consequently, all the subsequent proceedings leading up to the passing of the penalty order must fail. C.W.P. No. 3869 of 1997 is, therefore, liable to be allowed."

(emphasis supplied)

6.9.4. In both the decisions, the Delhi High Court, followed the observations of the Apex Court in CIT v. S. V. Angidi Chettiar [1962] 44 ITR 739. But, we have already pointed out that the decision of the Apex Court in CIT v. S.V. Angidi Chettiar [1962] 44 ITR 739, that a mere indication as to the initiation of the penalty proceedings separately in the Assessment order tantamount to an indication as to the satisfaction of the authorities that the assessee has concealed income or furnished inaccurate particulars, had not been brought to the notice of the Delhi High Court in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571; and (c) CIT Vs. Vikas Promoters P. Ltd., [2005] 277 ITR 337. For this reason and in the light of the law enunciated in various decisions of this Court, referred supra, with respect, we are unable to agree with the views expressed by the Delhi High Court in (a) Commissioner of Income-tax Vs. Ram Commercial Enterprises Ltd, [2000] 246 ITR 568; (b) Diwan Enterprises Vs. Commissioner of Income Tax and Others, [2000] 246 ITR 571; and (c) CIT Vs. Vikas Promoters P. Ltd., [2005] 277 ITR 337.

7.1. The supplemental question to be answered in this regard is whether the notice issued under explanation to Section 271(1)(c) of the Act, subsequent to the making of assessment order is a satisfactory compliance of the procedure for initiating penalty proceedings?

7.2. In this regard, it is apt to refer the decision of the Apex Court in D.M.Manasvi Vs. C.I.T., [1972] 86 ITR 556, wherein with reference to the scope and interpretation of Clauses (a) to (c) of Section 271(1) of the Act, it is held as follows:

"The fact that notices were issued subsequent to the making of the assessment orders would not, in our opinion, show that there was no satisfaction of the Income-tax Officer during the assessment proceedings that the assessee had concealed the particulars of his income or had furnished incorrect particulars of such income. What is contemplated by clause (1) of section 271 is that the Income-tax Officer or the Appellate Assistant Commissioner should have been satisfied in the course of proceedings under the Act regarding matters mentioned in the clauses of that sub-section. It is not, however, essential that notice to the person proceeded against should have also been issued during the course of the assessment proceedings. Satisfaction in the very nature of things precedes the issue of notice and it would not be correct to equate the satisfaction of the Income-tax Officer or Appellate Assistant Commissioner with the actual issue of notice. The issue of notice is a consequence of the satisfaction of the Income-tax Officer or the Appellate Assistant Commissioner and it would, in our opinion, be sufficient compliance with the provisions of the statute if the Income-tax Officer or the Appellate Assistant Commissioner is

satisfied about the matters referred to in clauses (a) to (c) of sub-section (1) of section 271 during the course of proceedings under the Act even though notice to the person proceeded against in pursuance of that satisfaction is issued subsequently."

(emphasis supplied)

7.3. Then again, if the view expressed by the Apex Court in CIT v. S. V. Angidi Chettiar [1962] 44 ITR 739, viz.,

"there is no evidence on the record that the Income-tax Officer was not satisfied in the course of the assessment proceeding that the firms had concealed its income. The assessment order is dated the 10th of November, 1951, and there is an endorsement at the foot of the assessment order by the Income-tax Officer that action under section 28 had been taken for concealment of income indicating clearly that the Income-tax Officer was satisfied in the course of the assessment proceeding that the first had concealed its income",

is interpreted in the light of the observation made by the Apex Court in D.M.Manasvi Vs. C.I.T., [1972] 86 ITR 556, referred to above, we find that the Assessing Officer got satisfied himself by indicating in the assessment order that "penalty proceedings are initiated separately under Section 271(1)(c) and 273 (2)(a)", particularly, when there is no evidence on record to show that the Income Tax Officer was not satisfied in the course of assessment proceedings that the firm had concealed its income.

7.4. At the stage of initiating penalty proceedings, what is required is only a subjective satisfaction and not a finding as to the satisfaction based on materials. Therefore, penalty proceedings can be initiated only after an assessment order has been made. Therefore, passing of assessment order cannot be held to be a bar for initiating penalty proceedings as contended by the learned counsel for the assessee. In other words, the acceptance of revised order itself cannot be a bar for initiating penalty proceedings under Section 271(1)(c) of the Act against the assessee for concealment of income.

7.5. We are fortified in this view by the decision of this Court in Commissioner of Income-tax Vs. C. Ananthan Chettiar, [2005] 273 ITR 401, wherein it is held as under:

"The assessee had offered no explanation except to assert that he disclosed the income only to buy peace with the Department and what was disclosed was additional income. The reason for not having disclosed the income earlier was not stated. Thus, the Tribunal was not right in holding that no penalty should be levied with

reference to the concealed income seized in the form of jewellery and cash."

(emphasis supplied)

7.6. Under the facts and circumstances of the case, it is clear that the original return filed by the assessee, when compared with the revised return pursuant to the notice issued under Section 143(2) of the Act forms the basis for the satisfaction of the Assessing Officer for initiating penalty proceedings under Section 271(1)(c) of the Act. The Assessing Officer, therefore, has rightly reached the satisfaction that the assessee had concealed income in the original return by way of indicating his satisfaction that the penalty proceedings are proposed to be initiated.

7.7. In any event, it is a settled law that once the authorities have arrived at a subjective satisfaction under the facts and circumstances of the case, it may not be proper for this Court to enter into the merits of the controversy at all in the proceedings under reference, as the Tribunal had rendered a clear finding that,

(i) the assessee did not act bonafide and honestly in returning the correct income originally;

(ii) the filing of the revised return offering additional income by way of adding interest expenditure cannot be considered as bonafide act; and

(iii) the Assessing Officer was fully justified in initiating and thereafter, levying penalty under Section 271(1)(c) of the Act, after calling for explanation from the respective assessee, as the assessee failed to offer any convincing explanation,

and unless it is demonstrated that such indication made by the Assessing Officer to initiate penalty proceedings is mala fide, perverse, based on no evidence, misreading of evidence or which a reasonable man could not form or that the person concerned was not given due opportunity resulting in prejudice, the said proceedings needs no interference.

7.8. Once, the scope of this Court exercising the power conferred under Section 256(2) of the Act is limited, in our considered opinion, the other contentions advanced by the learned counsel for the assessee that the Tribunal had erred in setting aside the well-considered orders of the Commissioner of Income Tax (Appeals) in toto is irrelevant for the disposal of these references. The question of law (i) is answered in favour of the Revenue.

8. Question (ii): Whether on the facts and in the circumstances of the case, the Tribunal has any material to hold that the assessee in filing the revised return of income has not acted bonafide? and

Question (iii): Whether on the facts and in the circumstances of the case the Tribunal was correct in holding that the levy of penalty is justifiable merely for the reason that no reasons were furnished by the assessee for filing an upward revision of income in the revised return of income?

8.1. As the questions of law (ii) and (iii) purely revolve around the findings of the Tribunal in paragraph (7) of the order dated 25.9.1997 holding that,

(i) the assessee did not act bonafide and honestly in returning the correct income originally;

(ii) the filing of the revised return offering additional income by way of adding interest expenditure cannot be considered as bonafide act; and

(iii) the Assessing Officer was fully justified in initiating and thereafter, levying penalty under Section 271(1)(c) of the Act, after calling for explanation from the respective assessees, as the assessees failed to offer any convincing explanation,

we find no reason to interfere with the order of the Tribunal and therefore, the questions of law (ii) and (iii) are also answered against the assessee.

sasi

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

1. The Assistant Registrar,
Income-tax Appellate Tribunal,
Rajaji Bhavan, Besant Nagar,
Chennai (5 copies with records)
2. The Secretary, Central Board of Direct Taxes,
New Delhi (3 copies)

3. The Commissioner of Income-tax (Appeals),
Coimbatore.

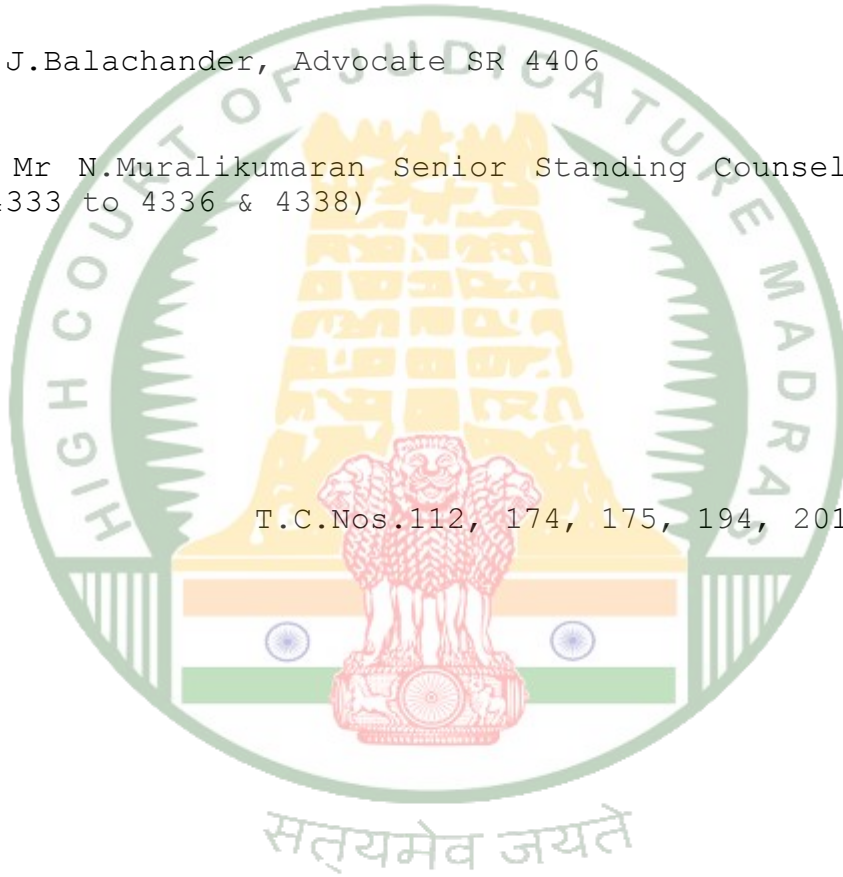
4. The Commissioner of Income-tax,
Coimbatore.

5. The Assistant Commissioner & Income Tax
Company Circle II (1)
Coimbatore.

+ One cc to Mr J.Balachander, Advocate SR 4406

+ Seven cc to Mr N.Muralikumaran Senior Standing Counsel for Income Tax
(SR 4206,4207,4333 to 4336 & 4338)

VC(CO)
CGS/10.4



T.C.Nos.112, 174, 175, 194, 201 to 204 of 2000

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